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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/688,863	10/17/2003	Terho Hoskonen	3003-00041	9447
26753 7590 10/16/2007 ANDRUS, SCEALES, STARKE & SAWALL, LLP 100 EAST WISCONSIN AVENUE, SUITE 1100 MILWAUKEE, WI 53202			EXAMINER NASSER, ROBERT L	
			ART UNIT 3735	PAPER NUMBER
			MAIL DATE 10/16/2007	DELIVERY MODE PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

## Office Action Summary

**Application No.**

10/688,863

**Applicant(s)**

HOSKONEN ET AL.

**Examiner**

Robert L. Nasser

**Art Unit**

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 10 August 2007.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 33-54 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 33-54 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)                                | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                       | 5) <input type="checkbox"/> Notice of Informal Patent Application                       |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____  |

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 8/10/2007 has been entered.

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 33, 35, 37, 38 and 54 are rejected under 35 U.S.C. 103(a) as being unpatentable over Burton 2004/0163648 in view of Sarkela et al 6950698. Burton sows a method including providing a base element, the mask and straps, of flexible material where the base element has an array of at least 3 electrodes 25 and an optical sensor 85 for measuring oxygen saturation, and a connector 16 connecting the electrodes and oximeter to a patient monitor. Burton also places the device on the body so that one of the electrodes is positioned between the eyebrows of the patient (see figure 4). The electrodes measure EEG and EMG, but the same electrodes do not measure both. Sarkela teaches similar method of monitoring parameters of a patient during surgery where the same electrodes are used to measure both EEG and EMG. Hence, it would have been obvious to modify Burton to use the same electrodes to measure both

parameters, as it minimizes the overall number of electrodes required. Claims 35 is rejected in that Sarkela teaches the arrangement of electrodes recited, noting that one of the two temple electrodes is "below the eye" in that it is lower on the face than the eye. Hence, it would have been obvious to modify Burton to arrange the electrodes as noted in Sarkela, as it is merely the substitution of one known arrangement of electrodes for another. Claims 37 and 38 are is rejected in that Sarkela teaches the arrangement of electrodes recited. Hence, it would have been obvious to modify Burton to arrange the electrodes as noted in Sarkela, as it is merely the substitution of one known arrangement of electrodes for another.

Claims 34, 36, and 39-42 are rejected under 35 U.S.C. 103(a) as being unpatentable over Burton in view of Sarkela et al, as applied to claims 33, 35, 37, 38, and 54 above, further in view of Bennett et al 6233472. The device of Burton is design to incorporate all sensors used in the OR to minimize monitors and/or connectors. Bennett teaches using electrodes positioned as recited in claim 34 to measure NMTs of a patient in surgery. As such, it would have been obvious to modify Burton to use the sensor or Bennett, as it is merely the incorporation of another device known to be used during surgery for monitoring a patient. Claim 36 is rejected in that Bennett teaches measuring NMT with two of the recited electrodes. Claims 39-41 are rejected in that applicant has not stated that the exact placement of the optical sensor is for a specific purpose or that it solves a stated problem. As such, where to place the sensor would have been a mere matter of design choice for one skilled in the art, as all of the recited locations function equally as well as the others.

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Claims 43-52 are rejected under 35 U.S.C. 103(a) as being unpatentable over Burton in view of Sarkela et al, Bennett et al 6233472, and Duckert et al 6389312. In addition to the features of the combination discussed above, Duckert further teaches that it is known to measure NMT response with a mechanical piezoelectric sensor. Hence, it would have been obvious to modify the combination to use a piezoelectric sensors, as it is merely the substitution of one known equivalent sensor for another. Claim 44 is rejected in that the exact electrodes to use with the NMT device would have been obvious to one skilled in the art. Claims 45, 47, and 49-52 are rejected for the reasons given above. Claims 46 and 48 are rejected in that the combination, particularly Bennett, teaches detecting NMT signals from one of the regions recited.

Claim 53 is rejected under 35 U.S.C. 103(a) as being unpatentable over Burton 2004/0163648. Burton shows a device including a base element of flexible material, i.e. the mask and straps, with a plurality of electrodes capable to measure EEG, EMG, and NMT, and an optical sensor 85. It does not actually measure NMT signals. Bennett teaches using electrodes positioned as recited in claim 34 to measure NMTs of a patient in surgery. As such, it would have been obvious to modify Burton to use the sensor or Bennett, as it is merely the incorporation of another device known to be used during surgery for monitoring a patient. Hence, the combination transmits NMT signals as well.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Robert L. Nasser whose telephone number is 571 272-4731. The examiner can normally be reached on m-f 9-5.

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If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Charles Marmor II can be reached on 571 272-4730. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

Robert L. Nasser  
Primary Examiner  
Art Unit 3735



RLN  
September 23, 2007